



FINANCIAL PLANNING  
ASSOCIATION *of* AUSTRALIA

Amanda Fairbairn  
Policy Lawyer  
The Behavioural Unit  
Australian Securities and Investments Commission  
GPO Box 9827  
Brisbane QLD 4001

Email: [remediation@asic.gov.au](mailto:remediation@asic.gov.au)

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Dear Ms Fairbairn

### CP335 - Consumer remediation: Update to RG 256

The Financial Planning Association of Australia (FPA) welcomes the opportunity to provide feedback to ASIC on its proposals to update Regulatory Guide 256: Consumer Remediation.

The FPA would welcome the opportunity to discuss with ASIC the issues raised in our submission. Please contact me on \_\_\_\_\_ or \_\_\_\_\_ if you have any questions.

Yours sincerely

*Head of Policy, Strategy and Innovation*  
Financial Planning Association of Australia<sup>1</sup>

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<sup>1</sup> The Financial Planning Association (FPA) has more than 14,000 members and affiliates of whom 11,000 are practising financial planners and 5,720 CFP professionals. The FPA has taken a leadership role in the financial planning profession in Australia and globally:

- Our first “policy pillar” is to act in the public interest at all times.
- In 2009 we announced a remuneration policy banning all commissions and conflicted remuneration on investments and superannuation for our members – years ahead of FOFA.
- We have an independent Conduct Review Commission, chaired by Dale Boucher, dealing with investigations and complaints against our members for breaches of our professional rules.
- The first financial planning professional body in the world to have a full suite of professional regulations incorporating a set of ethical principles, practice standards and professional conduct rules that explain and underpin professional financial planning practices. This is being exported to 26 member countries and the more than 175,570 CFP practitioners that make up the FPSB globally.
- We have built a curriculum with 18 Australian Universities for degrees in financial planning. Since 1st July 2013 all new members of the FPA have been required to hold, or be working towards, as a minimum, an approved undergraduate degree.
- CFP certification is the pre-eminent certification in financial planning globally.
- We are recognised as a professional body by the Tax Practitioners Board.



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# ASIC CONSULTATION PAPER335: CONSUMER REMEDIATION

Prepared for the Australian Securities and Investments Commission

1 March 2021

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## General feedback

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### Consistency

The FPA supports measures to enhance the compensation of consumers who have suffered loss or detriment due to misconduct, and welcomes the development of an updated Regulatory Guide (Updated RG256) that aims to provide clarity and assistance to licensees in understanding how and when to undertake investigations and identify appropriate and efficient compensation for affected consumers.

AISC proposes that the updated RG256 will apply to all financial services providers including large, medium and small businesses, and sole practitioners who hold a licence. While some licensees have experience in remediations, others may have never undertaken a remediation process before and will be guided by the updated RG to ensure they meet their legal obligations.

Schedule 11 of the Financial Sector Reform (Hayne Royal Commission Response) Act 2020 (FSRC 2020 Act) which is due to commence on 1 October 2021, introduces new definitions and obligations for

- breach reporting, which apply to all Australian Financial Services Licensees, and
- notifying clients, investigating and compensating clients in relation to 'reportable situations', which apply only where personal financial advice has been provided to a retail client in relation to a relevant financial product.

Given the proposal to apply the updated RG256 to all AFS and credit licensees, and trustees of regulated superannuation funds (but not SMSFs), approved deposit funds or pooled superannuation trusts, and retirement savings account providers, the FPA acknowledges there may be requirements within the law that set obligations for other financial services providers that relate to remediation.

The FPA suggests care is needed to ensure there is not a disconnect between the requirements in the law for a specific subsector and the obligations ASIC includes in the updated RG256. The FPA is concerned that obligations in the current RG and suggestions in CP335 may confuse licensees as, based on the wording used in these documents, they have the potential to be interpreted as redefining key definitions in the FSRC 2020 Act and creating two sets of requirements for the same steps in the remediation process. Businesses need consistency and certainty on the rules that apply.

The FPA's submission includes examples of CP335 proposals and current regulatory guidance obligations that could be misinterpreted as creating different requirements to those set in the FSRC 2020 Act.

### New legal framework

The FSRC 2020 Act received Royal Assent on 17 December 2020. Schedule 11 of this FSRC 2020 Act introduced a new legal framework for breach reporting, investigations, and consumer remediation for financial services licensees, which is to commence on 1 October 2021.

*As these are new requirements for licensees, the FPA recommends the related guidance from the Regulator clearly cite and integrate the obligations in the FSRC 2020 Act throughout the updated RG256: Consumer remediation guidance, to help licensees understand and embed the new legal requirements in their business.*

### Application of Regulatory Guide

#### *Personal financial advice providers*

As previously stated, the FSRC 2020 Act introduces investigations and consumer compensation obligations specifically applicable to personal financial advice providers (and mortgage brokers). The new

obligations include definitions, timeframes for conducting advice investigations, identifying and communicating with affected consumers, and compensation requirements, for example.

The FPA appreciates that ASIC proposes to extend the application of the obligations in RG256 to other financial services licensees and product providers who are not subject to the investigation and compensation provisions in the FSRC 2020 Act.

In CP335, ASIC states: "...these measures [in the FSRC 2020 Act] sit within the broader remediation and compensation framework, including the obligations discussed at paragraphs 6–10 and internal and external dispute resolution schemes. This broader regulatory framework and [RG 256](#) should be considered [by advice licensees] concurrently with these specific obligations.

However, many of the requirements and definitions in RG256 do not appear to clearly fit under the new provisions in the primary legislation. The FPA is concerned that this may create a parallel set of investigation and compensation requirements for personal financial advice providers, which will only serve to confuse licensees and complicate remediation programs for consumers. This has the potential to drive up the cost and timeframes of personal advice remediations, while providing no additional compensation benefit for affected consumers.

*The FPA recommends that care be taken to ensure the updated RG256 obligations complement and clarify the requirements in the Financial Sector Reform (Hayne Royal Commission Response) Act 2020, rather than create a dual process that advice providers would need to comply with.*

The FPA supports the remediation of consumers who have suffered loss as a result of misconduct and breaches of the law. This consumer right should apply to all participants of the financial services sector.

*The FPA supports ASIC's proposal to extend the application of the updated RG256 to all AFS and credit licensees and trustees of regulated superannuation funds (but not SMSFs), approved deposit funds or pooled superannuation trusts, and retirement savings account providers.*

In the updated RG256, ASIC must make it clear that all financial service providers are captured by the obligations including product providers, insurers, superannuation trustees, banks, etc.

The updated guidance must clearly state the interaction of RG256 with other regulatory guidance and provisions in the laws that set remediation/compensation/redress requirements for each financial services sub sector.

## Key terms

CP335 includes key terms that duplicate detailed definitions in the FSRC 2020 Act due to commence 1 October 2021, which specifically apply to the breach reporting for all AFS licensees, and investigations and consumer compensation obligations for personal financial advice providers.

Applying additional definitions in the updated RG256 risks creating a dual remediation framework and will unnecessarily complicate these obligations, drive up the cost, and reduce the efficiency of personal advice remediation programs with no additional benefits to financial advice consumers.

For example:

### *Definition of remediation*

The current RG256 requires the licensee to remediate clients (monetary or non-monetary compensation) who have suffered loss or detriment where a systemic issue has been identified and to remediate those clients for any loss or detriment suffered (RG256.46).

The key terms section of CP335 includes the following proposed new definition of "remediation":

*A process to investigate the full extent of a failure, and where appropriate, return all consumers that have suffered loss as a result of the failure to the position they would have otherwise been in, as closely as possible.*

In CP335, this definition has been adopted as a:

- “...key principle of [ASIC’s] guidance...” (paragraph 82),
- is a proposed criterion for the definition of a ‘beneficial assumption’, and
- will replace the low-value compensation threshold in the current RG256 (proposal F2 – “the starting position should be to return all consumers as closely as possible to the position they would have otherwise been in regardless of value”).

Identifying the “position the consumer would have otherwise been in” is a subjective measure as it would be dependent on multiple unknown variables that could result in a different outcome. This measure of remediation will create uncertainty for industry and consumers as it is open to interpretation and is not time-bound – that is, the “position the consumer would have otherwise been in” when; at what point in time?

In relation to an advice remediation, the ‘position a consumer would have otherwise been in’ would be dependent on the options available to the consumer at the time the failure occurred and many potential financial decisions the consumer may have decided to take at that time based on their circumstances.

Section 912EB(8) of the FSRC 2020 Act states that the licensee “take reasonable steps to pay the affected client an amount equal to the loss or damage within 30 days after the investigation is completed”. The requirement set in primary legislation provides a clear legal definition of the remediation amount - that is it should be “equal to the loss or damage”.

*The FPA understands ASIC’s need to quantify the definition in the FSRC 2020 Act and recommends “equal to the loss or damage to compensate the consumer as if the reportable situation/failure never occurred”.*

CP335 currently refers to ‘remediation’ and ‘initiating remediation’ in all sections of the consultation paper. This does not make it clear for readers that, as defined in the key terms of CP335, ‘remediation’ is “a process to investigate the full extent of a failure”.

Remediation is defined in the dictionary as a process to correct something that is wrong or damaged; to rectify it or reverse the damage. It is a term that can be misunderstood and may imply different aspects as to what may be involved in a remediation. For example, the more common layperson understanding of ‘remediation’ may be focused more on the outcome of a remediation, or the act of being remediated or receiving compensation; not the investigative process that proceeds the compensation.

Referring only to ‘remediation’ and not an ‘investigation and compensation’, may result in the requirements being misunderstood. It is also inconsistent with the FSRC 2020 Act. Section 912EB of the FSRC 2020 Act sets an “Obligation to investigate reportable situations that may affect [financial advice] clients”. Provision (8) of s912EB of the FSRC 2020 Act requires compensation. The focus of s912EB of the FSRC 2020 Act is the investigative due process to identify any ‘reportable situation’, any occurrence or likely occurrence of consumer loss, and ‘affected consumers’. Compensating affected consumers is the outcome of the investigation.

Undertaking a thorough investigation is integral to a successful remediation as it ensures:

- 1 all failures or potential failures are identified and fixed, and
- 2 all affected consumers are identified and compensated for any loss or damage suffered as a result of the reportable situation.

*To ensure an accurate and consistent understanding of the ASIC guidance in line with the FSRC 2020 Act, the FPA recommends the updated RG256 use the terminology ‘investigation and compensation’.*

### Definition of failure

ASIC has defined the term ‘failure’ in CP335 as:

*A misconduct, error or compliance failure relating to a financial service provided by and covered under a licensee’s relevant licence, as well as a broader failure to meet certain standards, expectations and/or values.*

*Note: A failure also extends to the decisions, omissions and behaviour of a licensee’s current and former authorised representatives, third-party service or product providers, consultants and subsidiaries related to the provision of financial services.*

However, s912D of the FSRC 2020 Act provides a detailed definition of a ‘reportable situation’ upon which the investigation and compensation requirements in the FSRC 2020 Act are built around.

It would be helpful for licensees if ASIC clarified in the updated guidance the cross-referenced provisions in ‘reportable situation’ and which laws that, if breached, would constitute a ‘reportable situation’ for which licensees and which financial services and products. This would provide greater certainty around when an investigation is required and link the remediation requirements with the new breach reporting obligations.

The FPA supports ASIC’s proposal to include ‘errors’ in a definition however, we recommend the definition of ‘errors’ should fit under the definition of ‘reportable situation’ in the breach reporting and investigation and compensation obligations in the FSRC 2020 Act. This would provide greater consistency for licensees.

*The FPA recommends the updated RG256 should rely on the terminology ‘reportable situation’ in the FSRC 2020 Act, clarify the definition ‘reportable situation’ in s912D of the FSRC 2020 Act and incorporate a definition of ‘error’.*

### Product failures

Paragraph 28 of CP335 states: “We are proposing to remove .... the suggestion that it may not be appropriate to remediate product failures from the current RG 256”.

The FPA notes the Product Design and Distribution Obligations (DDO) in RG274 in relation to consumer redress and compensation. For example:

*RG 274.245 If a consumer suffers loss or damage due to an entity’s breach of the design and distribution obligations in s994B, 994C, 994D, 994E(1) or (3), they can seek to recover that loss or damage in court by taking action against the entity.*

*RG 274.246 The court may award compensation for loss or damage.*

*RG 274.247 We can apply to the court seeking orders to redress, prevent or reduce the loss or damage suffered by non-party consumers when there has been a breach of the design and distribution obligations set out in s994B, 994C, 994D, or 994E(1) or (3) that has caused, or is likely to cause, non-party consumers to suffer loss or damage.*

*Note: Non-party consumers are persons who have not been a party to proceedings under the Corporations Act in relation to the contravening conduct: see s994P.*

*RG 274.248 When a consumer has suffered loss or damage—whether monetary or non-monetary or both—as a result of an entity’s breach of the design and distribution obligations, we expect that the entity will remediate the consumer.*

*Note: See also Regulatory Guide 256 Client review and remediation conducted by advice licensees (RG 256), which sets out our guidance on client review and remediation.*

Consumers who suffer loss due to product failures, should be properly and appropriately remediated for those failures by product providers as the 'at fault' party. Historically, consumers who have suffered loss due to product failures such as WestPoint, were left unprotected with no avenue for redress against the product provider and therefore attempted to seek redress through advice licensees. The intent of the DDO was to regulate financial products including to ensure avenues for consumer redress for product provider failures.

It is currently unclear how RG256, RG274 and the requirements in the Treasury Laws Amendment (Design and Distribution Obligations and Product Intervention Powers) Act 2019, interact to provide clear and appropriate avenues and outcomes for consumer remediation and compensation against product provider failures.

*The FPA recommends that with the removal of “the suggestion that it may not be appropriate to remediate product failures from the current RG 256”, the updated RG256 must clearly and categorically apply the requirement to remediate for product failures to product providers.*

*The FPA seeks:*

- urgent clarification from ASIC on how the proposed removal of “the suggestion that it may not be appropriate to remediate product failures from the current RG 256” interacts with the DDO provisions and RG274, particularly in relation to consumer access to redress / remediation / compensation, and*
- reassurance that the removal of “the suggestion that it may not be appropriate to remediate product failures from the current RG 256” will not inadvertently result in the remediation for product failures defaulting to advice remediations.*

## Interaction with other requirements

### *ASIC's Financial Services and Credit Panel (FSCP)*

In December 2020, the Government announced that the operation of ASIC's Financial Services and Credit Panel (FSCP) would be expanded to create a single, central disciplinary body for financial advisers as per the Royal Commission recommendation 2.10, with the responsibility of enforcing the legislated Financial Planners and Advisers Code of Ethics 2019 (the FASEA Code).

Under the FASEA Code, the single disciplinary body can impose sanctions on relevant providers found to have breached the FASEA Code. As stated in the Explanatory Memorandum to the FASEA Code, sanctions include requiring the relevant provider to 'provide the services to the retail client again at no cost, or to reduce or waive fees', and 'require specified corrective action'. It also states: "Under s1324 of the Corporations Act, any person may recover damages for a contravention of the Corporations Act, including a contravention of s921E through a breach of the [FASEA] Code" (paragraph 14).

*The FPA recommends:*

- including in the Updated RG256, details of the interaction of the licensee remediation obligations, and the enforcement of the FASEA Code by the FSCP, or the rights of the consumer to recover damages for a contravention of s921E under s1324 of the Corporations Act.*
- the system should permit consumer redress (compensation) via the licensee structure, to ensure a balance between consumer rights and natural justice.*

## *IDR / EDR timeframes*

The current RG256 details interactions between investigations and remediation, and a licensee's IDR processes and EDR scheme (RG256.49 – 55). This includes a requirement that complaints received through IDR and transferred to a remediation investigation must still meet the IDR timeframes.

Regulatory Guide 271: *Internal Dispute Resolution*, released July 2020, states that an 'IDR response' - a written communication from a financial firm to the complainant, informing them of the final outcome of their complaint at IDR (either confirmation of actions taken by the firm to fully resolve the complaint or reasons for rejection or partial rejection of the complaint) (RG 271.53) – must be provided to a complainant no later than 30 calendar days after receiving the complaint (RG 271.56).

However, the new requirements in sections 912EA and 912EB of the FSRC 2020 Act set detailed and specific timeframes for investigations and compensation, which are different to ASIC's IDR timeframes. For example, s912EB of the FSRC 2020 Act requires that:

*(4) The investigation must be completed as soon as is reasonably practicable after it is commenced.*

*(5) The financial services licensee must take reasonable steps to give the affected client a notice of the outcome of the investigation:*

*(a) in writing within 10 days after the completion of the investigation;*

Under s912EB of the FSRC 2020 Act, a financial services licensee must conduct an investigation if there are reasonable grounds to believe that a 'reportable situation' has arisen and that the affected client has suffered or will likely suffer loss or damage as a result of the reportable situation. Civil penalties apply to a breach of this obligation, including a breach of the timeframes set in s912EB(5).

Should a consumer complaint be captured by the definition of 'reportable situation', it is assumed these new obligations would apply.

The FPA suggest consideration must be given to the appropriateness of applying IDR requirements and timeframes to consumer complaints that are also captured under the investigation and compensation requirements introduced by the FSRC 2020 Act.

*The FPA recommends RG256 be updated:*

- in line with the new legislated requirements for investigations and compensation of reportable situations, and*
- to provide guidance to licensees on the process for transferring any IDR complaints that are found to meet the new definition of a 'reportable situation', and the new investigations and compensation obligations in s912EA and s912EB of the FSRC 2020 Act, to the appropriate licensee remediation process or program. The guidance should be clear that such complaints must comply with the investigation and compensation requirements and timeframes in the FSRC 2020 Act, not the IDR timeframes.*

## *External reviews*

The current RG 256.49(c) states that the external review of decisions from review and remediation will generally be carried out by the licensee's EDR scheme.

However, s912EB of the FSRC 2020 Act requires licensees to investigate and compensate consumers where "the affected client has a legally enforceable right to recover the loss or damage from the licensee". It is unclear whether consumers must have a 'legally enforceable right' to lodge a complaint with the Australian Financial Complaints Authority (AFCA) as it is not a law system. Under a 'legally enforceable right' a consumer would be required to sign a statutory declaration and tell the truth. Unfortunately,



statistics on the number of consumers who have sought a review of a remediation decision through AFCA is not publicly available.

Feedback from licensees indicates that many remediation programs to date have included multiple levels of review within the remediation process, including by an independent reviewer, as well as an appeals process for remediation consumers.

The FPA is supportive of consumers' right to an appeal of a licensee's decisions. However, the FPA is concerned that the current RG256 statement that "the external review of decisions from review and remediation will generally be carried out by the licensee's EDR scheme" is inconsistent with the legal provision under s912EB of the FSRC 2020 Act requiring licensees to investigate and compensate consumers where "the affected client has a legally enforceable right to recover the loss or damage from the licensee".

There is also concern about the risk of vexatious claims in reviews of remediation offers undertaken by AFCA following an extensive and costly remediation process. Given that the Ombudsman service is free to consumers, vexatious claims can result in a significant bill payable by the licensee.

*The FPA requests ASIC consider this issue further.*

### Legally enforceable right

Section 912EB of the FSRC 2020 Act requires licensees to investigate and compensate consumers where "the affected client has a legally enforceable right to recover the loss or damage from the licensee".

It may be unclear to licensees when a consumer has a legally enforceable right to recover loss.

*The FPA recommends ASIC include guidance in the updated RG256 on what constitutes a consumer's 'legally enforceable right to recover loss', and any suggested steps a licensee could consider to identify when a consumer has such a right. This guidance should be able to be tailored and scaled for every circumstance.*

### Scalability

The FPA supports the introduction of clear and flexible guidance that specifically permits the scalability of an investigation once initiated, as outline in paragraphs 35 and 36 of the consultation paper. As presented in CP335, scalability of investigation and compensation should clearly stand out in its own section of the updated RG256, and reinforced and referenced in throughout the guidance, with illustrative examples.

The FPA supports ASIC's proposed Note 3:

*A remediation once initiated can be scaled according to the size or scope of the failure. If the failure only affects a small number of consumers, the process to rectify the loss may be simple and prompt and not require a full 'program' to be initiated: see paragraphs 35–36.*

Considerations when scaling investigations and compensations must also include the size and scale of the business, and the type of service and/or product provided to the consumer.

*The FPA recommends ASIC monitor licensees' interpretation of this guidance to ensure:*

- *investigations and compensation in relation to significant misconduct including conduct constituting gross negligence or serious fraud, as per s 912D(2) of the FSRC 2020 Act, are not being inappropriately scaled, and*
- *licensees are confident about the ability to scale investigations and remediations, and do not unnecessarily over engineer simple investigations and remediations that could and should be scaled to deliver efficient and effective consumer outcomes.*

## Remediation flexibility

The FPA suggests consideration be given to the range of company structures, operational scale, and balance sheets, that the updated regulatory guide will apply to – from some of the largest corporations in Australia, to sole practitioners and small businesses of less than five employees. Large organisations are typically able to absorb the cost of paying a \$2million bill within a 30 day period (as required under the new FSRC 2020 Act) more easily than small businesses who may have a more restricted cash flow.

The requirement to pay a significant remediation bill over a one month period has the potential to bankrupt a small business, impacting its ability to pay the compensation owed. Depending on the type and severity of the breach related to the remediation, the continued operation of a small business could ensure compensation funds are available, benefiting affected consumers.

*The FPA supports the rights of consumers to be remediated appropriately and in a timely manner. However, we recommend flexibility be given for the payment of compensation by small licensees, to be considered and approved by ASIC on a case by case basis against strict criteria for both the licensee and the breach subject to the remediation. A licensee who has gained ASIC approval as meeting the strict criteria would be required to make a written offer of compensation to affected clients within 30 days of the completion of the investigation (as per the timeframe in the FSRC 2020 Act) that includes the ASIC approved payment plan.*

For example, a small financial planning licensee of five financial planners identified an administrative error that had been in place for a five year period. The licensee fixed the error as soon as it was detected. As the investigation was inconclusive as to which clients were or were not affected, the licensee decided to remediate all 2,000 clients of the practice. The investigation found the maximum loss or damage any client suffered as a result of the administrative error was \$150. With compensation totalling \$300,000, the licensee agreed to remediate each client \$150 in three \$50 payments over consecutive months. The remediation payment plan was set out in the offer of compensation provided to each client within 30 days of the completion of the investigation. The first payment was made via bank transfer within five days of providing the offer of compensation to clients.

### ASIC proposal B1

*B1 We propose to provide guidance on a two-tiered approach to initiating a remediation:*

*Tier 1—a remediation must be initiated when a licensee has engaged in a misconduct, error or compliance failure that has caused one or more consumers to have suffered potential or actual loss, detriment or disadvantage (loss) as a result; and*

*Tier 2—given the broad nature of the obligations on them, licensees should also turn their mind to whether a remediation is warranted when a failure causing loss has breached certain standards, expectations and/or values.*

*Note 3: A remediation once initiated can be scaled according to the size or scope of the failure. If the failure only affects a small number of consumers, the process to rectify the loss may be simple and prompt and not require a full 'program' to be initiated: see paragraphs [35–36](#).*

*B1Q1 Do you agree with our proposed two-tiered approach to initiating remediation? If not, why not?*

*B1Q2 Are there any practical problems associated with this approach? Please give details.*

*B1Q3 What is your current policy and procedure for initiating a remediation? How do you describe the standard of conduct required in your organisation for initiating a remediation?*

### FPA response

The FPA has concerns about ASIC's proposed two-tiered approach to initiating remediation.



### **Tier 1:**

The FPA has considered ASIC's two-tiered approach to remediation in conjunction with ASIC's proposal C1.

The FPA supports ASIC's proposed Tier 1 approach to remediation in conjunction with the following elements:

- *if there are reasonable grounds to believe that a licensee has engaged in a 'reportable situation' or error that has caused one or more consumers to suffer or likely suffer loss or damage as a result, and*

- *the remediation can be tailored and scaled, and launching a 'program' is not always necessary, as per paragraph 35 and 36.*

As discussed in response to proposal C1 below, *Tier 1 should also require that:*

- *the investigation must be against the standards for personal financial advice at the time that the reportable situation or error occurred,*
- *the relevant period for a remediation begins on the date a licensee reasonably suspects the 'reportable situation' or error first caused loss to a consumer, with a cap of a look back period of seven years, and*
- *where the reportable situation involves, or is suspected to involve, conduct constituting gross negligence or serious fraud, as per s 912D(2), the seven year look back cap should not apply.*

#### *One or more consumers*

ASIC has proposed that a remediation must be initiated when a licensee has engaged in a misconduct, error or compliance failure that caused actual or potential consumer loss to 'one or more' consumers, rather than a 'number of consumers'.

The FPA suggests it should be made clear that 'initiating a remediation' requires an investigation to be undertaken to understand the 'reportable situation' or error. Section 912EB(3) of the FSRC 2020 Act requires licensees who have provided personal financial advice to identify the conduct that gave rise to the reportable situation, the affected consumers, the amount of loss or damage that there are reasonable grounds to believe affected consumers have suffered or will suffer as a result of the reportable situation, and if the affected consumers have a legally enforceable right to recover from the licensee.

*The FPA supports the need to investigate beyond the one affected consumer subject to the first discovery of the breach or error, to ensure all affected consumers are identified and that the problem is not more widespread. This approach is aligned with the requirements in the FSRC 2020 Act.*

#### *What is an 'error'*

Tier 1 includes a proposal to include 'error' as a failure to explicitly capture circumstances such as when:

- a) the actual outcome of a business process differs from the promised outcome because of inadequate, non-existent or failed processes, people, systems or external events; and
- b) conduct (such as a systems, processing or manual error) results in a contractual failing.

*The FPA supports the need to investigate errors to ensure consumers have not and do not suffer loss or damage as a result of the error. However, this investigation must be scalable based on the circumstances.*

#### **Tier 2**

The FPA has considered each element of ASIC's proposed Tier 2 separately, including:

- Your consumers' standards and expectations
- Industry codes of conduct
- Your business values
- Other external standards and expectations

The FPA supports the ethical principle that licensees should be proactive and consider how they wish to treat their consumers but without going 'beyond what is reasonable to expect'. However, this should be encouraged and not mandated in Regulatory Guidance.

## *Your consumers' standards and expectations*

As a democracy, the laws and regulations that govern all parts of Australian society define consumers' standards and expectations, including in relation to the financial services sector. Through the democratic processes of Parliament, consumers' standards and expectations are documented in the law to provide businesses with measurable obligations against which they can:

- develop business processes and systems to meet their consumers' standards and expectations,
- monitor their compliance and whether they are meeting their consumers' standards and expectations, and
- be penalised if they fail to meet these documented standards and expectations of their consumers'.

Prior to becoming law, consumers' standards and expectations can vary depending on each consumer's worldview, experience, socio-economic background, life stage, goals, and the demographics of which the individual belongs. Consumers' standards and expectations can change over time, sometimes at a whim, and not all consumers' may hold the same standards and expectations, or at the same time.

Australia's Parliamentary process facilitates changes in the law to ensure consumers' standards and expectations of the day are captured, again documenting these expectations to oblige businesses. For licensees to be able to fulfil the remediation obligations, they must be able to identify failures against documented and measurable standards that were in place at the time the failure occurred. The law provides well-documented consumer standards and expectations that existed at any set point in time.

The FPA believes the core obligations in s912A provide 'catch-all' provisions that represent consumers' standards and expectations common to all participants in the financial services sector. In particular, the legal requirement in s912A(1)(a) to "do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly..." provides a clear and documented measure of consumers' standards and expectations that would most likely 'catch' any licensee failures that cause consumer loss or damage.

The FPA acknowledges that, as evidenced at the Hayne Royal Commission, some past licensee practices and failures that caused significant consumer detriment were not reported or addressed under these provisions. The issues presented at the Royal Commission highlighted consumers' standards and expectations that were not yet documented in the law – that if a licensee breaches the law, it must remediate those affected. Importantly, the new breach reporting and remediation obligations set in Schedule 11 of the FSRC 2020 Act, documents and legally obliges some businesses to meet this consumer standard and expectation.

The FPA believes consumers' standards and expectations must be clearly and appropriately documented to be able to be practically implemented in the investigation and remediation requirements of financial services licensees. The law provides the most appropriate and effective mechanism to consistently achieve the desired consumer outcomes across the financial services sector.

## *Industry codes of conduct*

Professional and industry codes of conduct are usually developed following a consultation process, including input from consumers and/or consumer representatives. Codes of conduct therefore, serve to codify and document consumers' standards and expectations at an industry sub sector level.

The FPA Code is enforced under the FPA Regulations and overseen by the Independent Conduct Review Committee. The enforcement and oversight of the FPA Code mean that its signatories must ensure and demonstrate compliance to its standards. If a breach of the FPA Code is suspected, the member is expected to investigate and undertake remedial action to rectify the breach.

However, tying the remediation obligations in the law and industry codes of conduct together through ASIC's proposed two-tiered approach to remediation, presents practical implementation issues. For example (but not limited to):

- If ASIC includes in RG256 a mandatory requirement to consider industry codes in remediation, it is natural to assume that there must be some regulatory oversight to ensure licensees are meeting this requirement. However, professional and industry bodies do not enforce or have the authority to enforce the law – this is the role and responsibility of the Regulator; and a Regulator does not have the legal authority to have oversight of an industry code. If a the Regulatory Guidance obliged licensees to remediate affected consumers for loss or damage caused by a breach of an industry code of conduct, who would be responsible for monitoring compliance with the code to ensure that there were no breaches of the remediation requirements? To ensure there are no breaches of the remediation requirements in relation to an industry code, the same body would need to ensure that no breaches of the industry code were missed by the licensee.
- This in turn may impose the investigation requirements in the law on the code of conduct provisions. However, the investigation requirements in the law apply to licensees. Not all industry codes apply to the licensee that is subject to ASIC's oversight of the provisions in the law. For example, the FPA Code of Professional Practice applies to practitioner members of the FPA, who are individuals, not licensees.
- The contract binding industry participants to the industry code obligations is usually between the participant and the industry body, not the Regulator. The contract binding FPA members to the obligations of the FPA Code is between the individual practitioner members, the FPA as the secretariat, and the FPA's Conduct Review Commission (CRC), an independent body put in place to ensure members are held accountable to the FPA Code of Professional Practice. The key functions of the CRC include determining whether disciplinary proceedings should commence against members, and hearing and determining complaints against members in respect of allegations of breaches of the FPA Code.
- Commonly industry and professional codes do not specifically provide for consumer compensation or redress. Sanctions for breaches of the FPA Code include that the member provides the services again at no cost or at reduced cost; and that the member provides an undertaking that may provide for corrective action or rectification of a matter or circumstance relating to the breach, including complying with the directions of the Conduct Review Commission within a reasonable period.
- Members sign up to industry codes in good faith based on the standards and enforcement requirements set under the code. Most industry codes include a requirement for an independent review of the code to be undertaken regularly and within a set timeframe. This includes a requirement to consult stakeholders, including consumers and subscribers to the code. However, using Regulatory Guidance to impose the remediation obligations on breaches of industry code provisions, avoids this contractual obligation to consult on changes to the code that commonly exists within industry codes. RG 183.82 requires an ASIC approved "code to be independently reviewed at intervals of no more than three years...to provide the opportunity for stakeholders to give feedback on how a code has operated in the past and how it might operate in the future.
- Industry and professional codes play a vital role in setting and documenting consumers' standards and expectations specific to a financial services sub sector to complement obligations in the law and regulations in protecting consumers. In relation to financial advice, the large majority of personal advice providers are members of a professional or industry code, even though many of the codes are voluntary. Applying Regulator imposed remediation obligations to a voluntary code has the potential to alienate signatories to professional and industry codes, which will significantly undermine the consumer protection role such codes play in the regulatory environment.

- As industry and professional codes are predominately voluntary, requiring licensees to consider codes in remediations will not be applied consistently across licensees as not all businesses or individuals are signatories to such codes.

These issues demonstrate the practicalities of imposing obligations in the laws overseen by a Regulator, onto the codes of conduct of professional and industry financial advice bodies.

While industry codes of conduct serve to codify and document consumers' standards and expectations at an industry sub sector level, it is the FPA's experience that where a breach of the FPA Code has caused consumer detriment it is commonly also a 'reportable situation' under the Corporations Act to which RG256 would likely apply. When a breach of the law is suspected, the investigation of the suspected breach is referred to the Regulator to action. Applying remediation obligations to industry codes may duplicate the investigative process and increase compliance and remediation costs in situations where consumers who have suffered detriment because of a breach of the law are already required to be remediated.

*The FPA recommends the new breach reporting and investigation requirements in the FSRC 2020 Act, including the new definition of 'reportable situation', and the inhibitive practicalities, make the inclusion of financial advice industry codes in ASIC's proposed two-tiered approach to remediation costly, problematic and unnecessary.*

### *Business values*

Business values are not legally binding. Not all businesses have documented values, and there is no legal obligation to have them.

It is also unlikely that not meeting business values would result in consumer loss or damages that can be directly linked back to the business values alone and not a breach of the provisions of the Corporations Act, particularly s912A.

While it may be good professional practice to provide an apology for not living up to the values a business purports to hold, the FPA suggest including business values as a Regulator mandated requirement of consumer remediation may complicate the remediation process and distract licensees from focusing on the potential breach of the law. It would also add to regulatory costs as businesses would need to monitor and document how they meet their business values to be able to determine if a remediation situation occurs in the future. Including business values also impacts the scalability of the remediation process.

## **ASIC proposal C1**

*C1 We propose to provide guidance that, as a starting point, the relevant period for a remediation should begin on the date a licensee reasonably suspects the failure first caused loss to a consumer.*

*C1Q1 Do you agree with this proposal? If not, why not?*

*C1Q2 Are there any practical problems associated with this proposal? Please give details.*

*C1Q3 Are there any other matters that we should consider to help us provide appropriately scalable guidance?*

### FPA response

The FPA considered ASIC proposal C1 from multiple perspectives, including:

- consumers' right to compensation,
- principles of natural justice and procedural fairness,

- appropriate 'look back' period for investigations for a range of 'reportable situations',
- record keeping practices and obligations within the law,
- statute of limitations for a civil claim, and
- recent changes in financial services law.

In recent years, and particularly since the Financial Services Royal Commission, there has been significant changes in the financial services law to address issues that have resulted in the consumer loss subject to high profile remediation programs. For example, as reported by ASIC, six of Australia's largest banking and financial services institutions have paid or offered a total of \$1.24 billion in compensation through these remediation programs, as at 31 December 2020 - 99 percent of the 983,770 affected consumers were found to have suffered loss or detriment because of fees for no service misconduct<sup>2</sup>.

Industry practices have changed to stamp out such misconduct and embrace the new regulatory requirements. Breach reporting and penalties have been significantly strengthened, as have ASIC's enforcement powers. The strengthened regulatory environment and industry changes have:

- significantly reduced the risk of such detrimental practices occurring in the future,
- provided mechanisms for identifying issues under an improved and clear consumer-focused definition of 'reportable situation' which can be applied consistently across the industry,
- encouraged enhanced governance and significantly reduced the risk of 'reportable situations' not being identified within the current seven year requirement, and
- ensured any future issues with the potential to cause consumer harm will be identified, reported and addressed in a more timely and effective manner.

The FPA agrees with ASIC's statement that "if licensees have proper governance and risk management frameworks in place, then review periods for remediations should rarely exceed seven years" (paragraph 41).

However, the FPA is concerned that the proposal that "the relevant period for a remediation should begin on the date a licensee reasonably suspects the failure first caused loss to a consumer" requires the licensee 'look back' as far as possible, with no end date, with a view of 'finding' something that may not exist. In many cases, this may unnecessarily drive up the cost of the remediation program with no benefit to the consumer, is against the principles of natural justice and procedural fairness, and may exceed the statutes of limitations for negligence within the law.

Complications have arisen in recent remediation programs when the look back period extended beyond the seven year record keeping requirements. This has led to the need to use assumptions in the investigation and remediation process.

This proposal must balance a consumer's right to compensation and the principles of natural justice and procedural fairness. However, look back periods beyond the current seven years can result in issues with professional indemnity insurance time limitations, particularly if different licensees are involved in the investigation and the remediation requires negotiation on the liability of each party. As this proposal effectively removes the statute of limitations in relation to remediation, it may give rise to firms phoenixing themselves for the purpose of mitigating risk.

The FPA believes there may be merit and justification for a look back period to extend beyond the current seven year period depending on the type, severity and scale of the 'reportable situation'.

*The FPA recommends further consultation and consideration be given to a scaled implementation of proposal C1. For example:*

<sup>2</sup> <https://www.asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-023mr-asic-update-compensation-for-financial-advice-related-misconduct-as-at-31-dec-2020/>



1. *the relevant period for a remediation should begin on the date a licensee reasonably suspects the 'reportable situation' or error first caused loss to a consumer, with a cap of a look back period of seven years,*
2. *where the 'reportable situation' involves, or is suspected to involve, conduct constituting gross negligence or serious fraud, as per s 912D(2), the seven year cap should not apply,*
3. *the investigation must be against the advice standards in place at the time that 'reportable situation' or error occurred.*

*The impact of this suggested proposal on PI insurance, current record keeping practices and regulatory requirements should be investigated through extensive and broad consultation to understand and address any issues this may create, including the need for a clear and appropriate transition.*

Extensive consultation on the impact of this suggested scaled proposal on record keeping requirements is necessary given the 5 year penalty for breaching s912EC(1) of the FSRC 2020 Act, and the current record keeping requirements currently set at 5, 6 and 7 years in various Commonwealth laws.

Advancements in technology have enabled electronic documentation and secure record keeping, reducing the challenges associated with maintaining client files for extended periods, particularly for former clients. It is necessary for the regulatory environment to keep pace with technology advancements to permit electronic client communication, documentation, authorisation and record keeping, to support licensees.

## **ASIC proposal D1**

*D1 We propose to provide guidance that, overall, licensees should only use assumptions in a remediation if they are beneficial assumptions. In particular, this guidance would cover what a beneficial assumption is and set out what should be considered when using assumptions, including for specific types of assumptions.*

*D1Q1 Do you agree with our proposal for assumptions to be beneficial and that they should satisfy certain considerations? If not, why not?*

*D1Q2 Is it appropriate to use assumptions that result in a partial refund for some affected consumers or that involve a discount for a consumer's 'use' of the product? If not, why not?*

*D1Q3 Is it appropriate to use an assumption based on an average (e.g. in calculating loss, using the average premium or the average fees charged over a relevant period)? If not, why not?*

*D1Q4 Have you used an assumptions-based approach in remediations? Please provide details, including evidence of how the assumptions benefited the consumer and if you have used an average that resulted in a good consumer outcome.*

## **FPA response**

*The FPA supports ASIC's proposal to define 'beneficial assumptions', including that assumptions must be beneficial for consumers, and set conditions for their use.*

Guidance from ASIC would assist licensee to identify appropriate assumptions, the circumstances in which assumptions can be used, and how assumptions should be applied in remediation programs.

ASIC proposes that "When applying assumptions, licensees should first consider whether the assumption:

- a) aims to return all affected consumers as closely as possible to the position they would have otherwise been in (this may include giving a consumer the benefit of the doubt);
- b) is evidence-based and well documented; and

- c) is monitored to ensure the assumption continues to achieve the goal of returning consumers as closely as possible to the position they would have otherwise been in throughout the remediation.”

As discussed above, the FPA is concerned about ASIC’s proposed definition of ‘remediation’ which would require licensees to use beneficial assumptions that “aim to return all affected consumers as closely as possible to the position they would have otherwise been in (this may include giving a consumer the benefit of the doubt)”.

*The FPA recommends ASIC use a quantified version of the definition in the s912EB(8) to take reasonable steps to pay the affected client an amount “equal to the loss or damage to compensate the consumer as if the reportable situation or error never occurred”. This will provide clarity and consistency with the requirements in the FSRC 2020 Act for licensees.*

*The FPA supports the proposal that beneficial assumptions be evidence- based, well documented and monitored.*

### *Scoping assumptions*

ASIC proposes that in determining which consumers should be included in the remediation (scoping assumptions), beneficial scoping assumptions should benefit consumers by preferencing inclusivity rather than exclusivity (i.e. the assumptions widen the net to capture more consumers rather than less).

Section 912EB(1)(c) of the FSRC 2020 Act requires licensees to investigate when:

(c) there are reasonable grounds to suspect that:

- (i) the affected client has suffered or will suffer loss or damage as a result of the reportable situation; and
- (ii) the affected client has a legally enforceable right to recover the loss or damage from the licensee.

*The FPA recommends ASIC’s guidance on beneficial scoping assumptions should include the requirement in the FSRC 2020 Act to determine that the client has a legally enforceable right to recover the loss or damage.*

### *Refund assumptions*

ASIC proposes that beneficial refund assumptions should

- a) err on the side of overcompensation, rather than under compensation; and

Note: That is not to say that licensees are obliged to overcompensate, rather that if they choose to use assumptions to save time and cost or account for absent records, the assumptions should equate to actual loss or err towards overcompensation rather than risk returning less than what consumers are owed.

- b) not be used to justify limiting or preventing a consumer’s right to challenge a remediation outcome through internal dispute resolution (IDR) systems or to make a complaint to the Australian Financial Complaints Authority (AFCA).

As discussed in FPA’s response to proposal H1 below, section 912EB(10) and (11) of the FSRC 2020 Act will override any settlement deed put in place by the licensee and will ensure consumers’ access to seek a review of the remediation offer. The FPA suggest the guidance include a ‘note’ referencing the requirement in the FSRC 2020 Act.

Please also refer to FPA's discussion above in the section of this submission: *Interaction with other requirements*.

### *Assumptions based on averages*

As proposed in ASIC's three-step framework for calculating foregone returns or interest, the FPA supports the use of assumptions based on averages if an evidence-base supports it, when identifying appropriate refund assumptions in step 2, if it is not appropriate, possible or reasonably practical to find out the actual rates.

The evidence-base should include market comparisons. For example:

- Assessing the exact investment loss of a client holding a portfolio with 15 investments, would take an excess amount of time. If the client's holding were in a balanced portfolio, an average return for a balanced portfolio could be used. A comparison against at least three balanced portfolios in the market should be made to test the appropriateness of the average return.
- Similarly, assumptions based on averages can offer significant and appropriate efficiencies in identifying the loss incurred by clients with a large portfolio of shares.

Assumptions based on averages should benefit the consumer.

### *Using beneficial assumptions and professional indemnity insurance*

Consumer compensation in financial services is underpinned by the requirement to hold professional indemnity insurance. While assumptions may make the investigation process and timeframe shorter and have the potential to result in more clients being compensated more quickly, ASIC should investigate whether the reliance on assumptions in investigations can create issues with professional indemnity insurance.

## **ASIC proposal D2**

*D2 We propose that licensees should apply beneficial assumptions if they need to make up for absent records, especially if absent records may be considered a breach of their record-keeping obligations.*

*D2Q1 Do you agree with our proposal that beneficial assumptions should be used to make up for absent records? If not, why not?*

*D2Q2 Are there any practical problems associated with this proposal? Please give details.*

*D2Q3 Are there any other matters that we should consider to help us provide appropriately scalable guidance?*

### FPA response

ASIC proposes to clarify that if a licensee has failed to keep records in line with its obligations and as a result is unsure whether a consumer has suffered a loss, that the licensee should make beneficial assumptions in that consumer's favour if there is evidence to suggest the consumer has been, or may have been, affected by the failure.

Using beneficial assumptions to make up for absent records is reasonable where there is a lack of evidence. Appropriate and relevant considerations should be used in the development of the assumptions. Determining appropriate and relevant considerations will vary depending on the circumstances and the type of services and products provided and involved in the remediation.

For example, considerations for developing assumptions for financial advice will be different to those appropriate and relevant to superannuation remediations. If there is a lack of evidence in an advice investigation, such as a risk profile, licensees could develop assumptions about affected clients based on other available information such as the client's life stage and age. Depending on the client's circumstances and the type of advice provided, other considerations for inappropriate advice investigation assumptions could include (but not limited to), for example, the client's:

- financial position with gearing,
- the investment options the consumer is invested in,
- market returns on asset allocations over time,
- dividend payouts and reinvestments,
- corporate actions,
- risk profile,
- disadvantaged clients (age, health, clients etc),
- what a reasonable percentage base fee is,
- max limit exposure to single assets,
- inappropriate investments,
- substantial investments,
- the length of time the consumer has invested in a product,
- a benchmark number of transactions to test whether activity is excessive and indicative of churning or share trading rather than investment advice
- whether insurance premiums exceed more than 80 per cent of the client's superannuation contributions
- insurance cancellations

ASIC could consider developing practical sub sector specific guidance (eg. advice providers, product providers, superannuation trustees) about the appropriate and relevant considerations that licensees could use to develop of the beneficial assumptions to make up for absent records. This could be offered as resource to help licensees in each subsector and should not set new legal obligations, as per ASIC's *Making it Right: how to run a consumer centred remediation licensee tool*.

*The FPA supports ASIC's proposal that licensees should apply beneficial assumptions if they need to make up for absent records, especially if absent records may be considered a breach of their record-keeping obligations.*

### **ASIC proposal D3**

*D3 We propose that in certain circumstances it may be appropriate to use beneficial assumptions to increase the efficiency of a remediation.*

*D3Q1 Do you agree with this proposal? If not, why not?*

*D3Q2 In what circumstances do you think it is appropriate to use assumptions to increase the efficiency of a remediation? Please give reasons.*

*D3Q3 Have you applied beneficial assumptions to increase the efficiency of a remediation?*

*Please provide details, including any relevant data and documentation.*

### FPA response

Whether assumptions should be used for efficiency purposes must be assessed on the circumstances. The FPA supports ASIC's view that "using assumptions to increase efficiency may not always be appropriate or possible and licensees should first consider if the remediation is properly resourced".

However, there may be circumstances where the use of assumptions may be appropriate and offer consumer benefits. For example:

- Large remediation programs often require a large number of staff to implement. Appropriate, relevant and well-documented assumptions providing remediation staff a set of base rules to be used as a guide of what to look for in file reviews, can assist in to minimising the risk of affected consumers not being identified or consumer loss being inaccurately determined.
- If the resources to investigate are costly and the client losses are small, the use of appropriate assumptions can significantly improve the efficiency of the remediation and minimise the duration of the process for consumers.

*The FPA supports the proposal that ASIC provide guidance that will offer a level of consistency in how licensees can increase efficiencies using assumptions.*

## **ASIC proposal E1**

*E1 We propose to revise our current guidance on calculating foregone returns or interest by setting out a three-step framework that involves:*

*Step 1—licensees should attempt to calculate actual foregone returns or interest rates, without the use of any assumptions, if it is appropriate to do so in the circumstances;*

*Step 2—if it is not appropriate, possible or reasonably practical to find out the actual rates, licensees should consider whether beneficial refund assumptions can be made if an evidence-base supports it; and*

*Step 3—if there is no evidence base to support a beneficial assumption, licensees should apply a fair and reasonable rate that compounds daily and is:*

- *reasonably high;*
- *relatively stable; and*
- *objectively set by an independent body.*

*Note: The fair and reasonable rate in Step 3 is currently outlined in RG 256 at RG 256.131.*

*E1Q1 Do you agree with this proposal to set out a three-step framework for calculating returns or interest? If not, why not?*

*E1Q2 Are there any practical problems associated with this proposal? Please give details.*

*E1Q3 Should our guidance clarify whether the rate compounds (and at what interval) or whether it should be based on simple interest? Please give reasons.*

### **FPA response**

The FPA provides in principle support for ASIC's proposed three-step framework for calculating foregone returns or interest.

However, the FPA request ASIC review its guidance on the use of the cash rate set by the RBA in exceptional circumstances as suggested in the current RG256 at RG256.133 and discussed in paragraph 78 of CP335.

The FPA has received feedback on the use of the RBA cash rate plus 6% calculation in remediations instead of the performance of funds. When the compensation offer was declined and a request made for the actual fund performance to be used instead of the RBA cash rate, the remediation offer was doubled.

However, this example highlighted an issue in the timeliness of receiving a response to requests for information from fund managers and product providers to enable the advice provider to determine the actual loss.

*The FPA recommends ASIC consider guidance to require financial services providers to cooperate with remediation programs and investigations undertaken by other licensees, and provide timely responses to requests for information, particularly in relation to fund / product performance.*

## **ASIC proposal F1**

*F1 We propose to provide guidance that licensees should apply best endeavours to find and automatically pay consumers, and that cheques should generally be issued as a last resort.*

*F1Q1 Do you agree with our proposal? If not, why not?*

*F1Q2 What has been your experience in finding and contacting consumers? What challenges have you faced?*

*F1Q3 What strategies have you employed to successfully reach all affected consumers? Please give examples of your experiences, including what has and has not worked and any lessons learnt.*

*F1Q4 Do you agree that cheques should be paid as a last resort? If not, why not?*

*F1Q5 What has been your experience in finding a consumer's bank account details and making a direct payment? Please give details.*

*F1Q6 If you are a third-party licensee for a superannuation fund or RSA, what challenges do you have in remediating members of that fund? Please give details.*

*F1Q7 If you are a superannuation trustee, what challenges do you have in accepting and/or facilitating remediation payments from third-party licensees? Please give details.*

## **FPA response**

The FPA welcomes the inclusion of this issue in the ASIC guidance and provides the following feedback on considerations on the challenges associated with finding 'lost consumers', particularly if a consumer has exited or closed a product or service:

- It can be extremely time consuming to find consumers and identify a manner in which the consumer is comfortable to engage with the investigation.
- Privacy issues can hinder a licensee's attempts to engage with 'lost consumers'. While licensees can use a postal address or message/call a consumer if they have their details, contacting lost consumers through other communication mediums such as via social media platforms raises privacy concerns.
- Consumers are fearful of the threat/risk of a scam, which hinders lost consumer engagement with licensees.

- It can be problematic if the licensee's branding differs from the advice provider's business name and branding as the consumer has/had the relationship with the advice provider, not necessarily the licensee.
- Licensee's need to consider the consumer's age and therefore preferred communication channels when identifying the most effective medium to engage with a 'lost consumer' in relation to the remediation.
- Licensees have also used newspaper articles and posts on their website in an effort to engage with lost consumers
- Finding consumers, particularly in relation to low value compensation, can be extremely time consuming and expensive and can yield low results.

## ASIC proposal F2

*F2 We propose to remove the low-value compensation threshold in current RG 256 and instead provide guidance that:*

- *the starting position should be to return all consumers as closely as possible to the position they would have otherwise been in regardless of value;*
- *it is up to licensees to decide how they will treat their unresponsive or lost consumers, and if applying a compensation threshold, what low value is fair and appropriate in line with their obligations; and*
- *if applicable, the reasons for the decision to apply a low value threshold should be well documented and appropriately justified.*

*F2Q1 Do you agree with our proposal? If not, why not?*

*F2Q2 Do you think that any licensee using a low- value compensation threshold should have to disclose it? If not, why not?*

### FPA response

The FPA is generally supportive of ASIC's approach to providing guidance on compensation where consumer loss is so small that the cost to investigate outweighs the loss suffered by the consumer.

In line with the recommendation made above in relation to key terms, the FPA recommends the starting position should be to compensate the consumer as if the reportable situation or error never occurred, regardless of value.

The FPA suggests ASIC provide guidance to assist licensees in identifying a compensation threshold that benefits the consumer, not the licensee. For example, guidance on how to determine whether a percentage or dollar amount is appropriate. Applying a 'reasonable person test' to check that the licensee's compensation threshold is fair, appropriate and benefits consumers may also be worthwhile.

Transparency is a key principle to ensuring consumer understanding of the remediation process and their assessment of whether the investigation and compensation is fair and reasonable. Therefore, the FPA supports a requirement for any licensee using a low-value compensation threshold to disclose it.

## ASIC proposal G1

*G1 We propose to clarify current guidance for when remediation money cannot be returned to consumers. That is, if a licensee cannot, despite best endeavours, find consumers to pay them compensation (including when cheques remain uncashed):*

- the licensee must not profit from the failure (see the current [RG 256](#) at RG 256.135);*
- the residual funds should be sent to a relevant state or federal unclaimed money regime if available; and*
- if the licensee is unable to lodge money with an unclaimed money regime, as a last resort, the money should be paid as a residual remediation payment to a charity or not-for-profit organisation registered with the Australian Charities and Not-for Profits Commission.*

*G1Q1 Do you agree with our proposal? If not, why not?*

*G1Q2 Is it appropriate for ASIC to provide guidance that any money that cannot be directly returned to consumers be lodged in an unclaimed money regime? If not, why not?*

*G1Q3 What challenges are there in lodging unclaimed money? Please give details.*

*G1Q4 Do you think any licensee making a residual remediation payment to a charity or not-for-profit organisation should have to clearly disclose it? If not, why not?*

*G1Q5 Do licensees have evidence of consumers requesting that they be remediated after the finalisation of the remediation? How common is this?*

### FPA response

The FPA supports ASIC's proposal to clarify current guidance for when remediation money cannot be returned to consumers.

*The FPA recommends unclaimed moneys from advice remediation programs and investigations be lodge in a pool of funds for the compensation scheme of last resort (CSLR) which the government has committed to establishing.*

## ASIC proposal H1

*H1 We propose to clarify our guidance about if and when using settlement deeds and relying on implied consent may or may not be appropriate as part of a remediation.*

*H1Q1 In what circumstances, if any, are settlement deeds essential to protect your legitimate interests? Please provide examples or other supporting evidence.*

### FPA response

The FPA suggests the two elements of ASIC proposal H1 should be considered separately and in relation to the new legal requirements under the FSRC 2020 Act.

Paragraph 110 of CP335 states that "settlement deeds can be problematic in that they may act to limit or remove existing consumer rights, in particular the right to make a complaint through IDR and to AFCA, in situations where a consumer might not be able to determine whether an offer is adequate..."

However, section 912EB(10) and (11) of the FSRC 2020 Act specifically relate to the rights of affected consumers to pursue legally enforceable avenues to recover loss or damage suffered as a result of the reportable situation:



*Nothing affects right of affected client to pursue legally enforceable rights*

*(10) Nothing in this section affects any legally enforceable right of the affected client to recover loss or damage that the affected client suffers, or will suffer, as a result of a reportable situation.*

*(11) However, a court may take into account the amount paid by the financial services licensee under this section when quantifying the amount of compensation (if any) to be paid by the licensee in relation to that loss or damage.*

These provisions in the FSRC 2020 Act will override any settlement deed put in place by the licensee and will ensure consumers' access to seek a review of the remediation offer.

Guidance on when it may or may not be appropriate to rely on implied consent as part of a remediation may still be applicable and helpful for licensees in relation to remediation offers and payments.